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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1489

CHARM PROMOTIONS, LTD.,
Petitioner,

vs.

THE TRAVELERS INDEMNITY COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The petitioner presents one—and basically only one—contention to this Court. That contention is that this Court must declare it to be the law that *any* communication between Court and jury outside the presence of counsel invalidates a verdict —and that without regard to any question of whether or not the communication is prejudicial. The Petitioner contends that such a rule exists and that it is found in pronouncements of this Court. When Judge Learned Hand wrote:

> "But, like other rules for the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity." (*U. S.* v. *Compagna*, 146 F. 2d 524, 528 (2d Cir. 1944))

he was stating both common sense and sound law. This Court denied certiorari (324 U. S. 867) in *Compagna* and also denied certiorari in *Walker* v. *United States*, 322 F. 2d 434 (D. C. Cir. 1963) *cert. denied* 375 U. S. 976.

In this case, the Court of Appeals met this question directly —not once but twice, since it was first raised by petitioner in its preliminary motion for summary reversal.

The Court of Appeals, in affirming the judgment entered in favor of respondent, neither overlooked nor misapprehended the issue presented. The decision of the Court of Appeals is reported at 489 F. 2d 1092 (7th Cir. 1973). The Court dealt with specifically and expressly rejected the "per se" rule asserted by petitioner—finding that the communication could not and did not "affect the substantial rights of the parties." (489 F. 2d at 1096)

Petitioner moved for a Stay of Mandate, supporting the motion with an affidavit of intent to file a Petition in this Court. Thereafter, however, a most unprecedented course of conduct was initiated. Petitioner seems to have taken the position that the decision of the Court of Appeals gave petitioner some right not to attack that decision through the ordinary process of review but to attack it through the presentation of evidence. Petitioner claimed a right to prove through "evidence" not in the record before the Court and not presented to the trial judge that the decision of the Court of Appeals was *in fact* wrong. For the purpose, petitioner presented to the Court of Appeals (after prescribed time) a Petition for Rehearing supported by the Affidavit of Ruth Scheele. Ruth Scheele was one of the jurors. She had given an affidavit which was filed in support of petitioner's motion for a new trial and considered by both the trial judge and by the Court of Appeals before the decision was rendered. She had moved to Texas. Petitioner pursued her there for a second affidavit. This second affidavit purported to recite the deliberations of the jury, to give the state of mind of the several jurors, and to cover, in affidavit form, what

"would have been" if there had been no communication between the trial court and jury. That the affiant could not properly testify to the matters set forth in the affidavit is patent. Even if the subject of inquiry were a proper one, and the forum an appropriate one, she could not testify concerning the thoughts, motives, or predicted activities of others. Moreover, the subject of inquiry was an improper one and there could be no "trial" in the Court of Appeals in any event.

Petitioner seems to assume or, at least, pretends to assume that the opinion of a Court of Appeals can be set aside by offering evidence to prove that a conclusion reached by the Court is not a "fact". This attitude represents such a total deviation from all accepted standards of judicial procedure, that it is difficult to believe that it is presented in good faith.

The conclusions of a Court of Appeals are based upon the record before the Court. A Court of Appeals reviews the decision of a trial court, and its decision is based upon matters presented in the trial court. The decision of a Court of Appeals is subject to review, but only in the manner provided by statute. It is not subject to attack by offering new evidence designed to prove that it is wrong. Petitioner simply cannot do what it has attempted to do. An affidavit of a juror cannot attack the conclusion of the Court of Appeals that: ". . . the jury's subsequent communication with the Judge was irrelevant to the ultimate issue: Traveler's liability to Charm for the dishonest acts of Charm's employees." (489 F. 2d at 1096)

There are several reasons why this is so.

In the first place, the conclusion of the Court of Appeals is one of law and not one of fact. The Court properly pointed out that dishonesty is not coextensive with criminality. This is a proper statement of law and was even so stated to the jury in an instruction tendered by petitioner. Because petitioner says in a brief that criminal liability was "a material issue" does not make it so—and particularly when the jury has been instructed

to the contrary at petitioner's own request. Criminal liability—if any—is *not* material. (We can ignore the fact that the answer of the judge was that there was no criminal liability.) Decisions of Courts of Appeal on matters of law are not overruled by affidavits of jurors.

Secondly, the verdict of a jury cannot be impeached by the affidavit of a juror. Jurors are permitted in certain circumstances to testify to the fact of communication and what the communication was, but the holdings are uniform that the deliberations of jurors are not to be reviewed outside the jury room. Contentions going to the state of mind of the jurors, their understanding of facts or law, or any of those matters which form part of the decision-making process are not subject to review. This Court has set forth the basis for this governing principle of law:

> "But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those that took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside the verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference." *McDonald* v. *Pless*, 238 U. S. 264, 35 S. Ct. 783, 59 L. Ed. 1330 (1915).

Ruth Scheele was one of twelve—her opinions are the opinions of one. It can be noted that her affidavit states that the jury was deadlocked before the note was sent—a situation in which petitioner could not prevail. But the law does not permit outsiders to review the process by which a jury moves to its unanimous decision. That decision cannot be impeached by

the testimony of a juror, much less by an affidavit not meeting the tests applied to direct evidence.

There is absolutely no reason why this case warrants review by this Court. It involves no substantial federal question upon which a decision of this Court would have any value as precedent. This is a very particular situation. It centers entirely upon the attempt of Petitioner to use the affidavit of Ruth Scheele —an affidavit which is incompetent in itself and which could not be used in the manner attempted in any event. This case has been decided properly. The decision of the Court of Appeals is clear and unambiguous. Petitioner seeks to establish a rule which would require reversal where there is no prejudice—a rule that would be a senseless one and a bad one. This Court has repeatedly denied certiorari when there has been an attempt to establish such a rule and it should be denied in this case.

Respectfully submitted,

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